Statement of Reason for Appeal

Summary: The FAR variance for 113 E 26th St, approved by the Planning Commission on Oct. 5, was justified by the presence of soil contamination in concentrations too high to allow the excavation of an underground parking lot. But in making this claim, the applicants have presented no evidence of current soil conditions at the site—conditions that are unknown even to the responsible project manager at the Minnesota Population Control Agency. We therefore appeal the decision of the Planning Commission, and argue that the request for FAR variance should not be granted until soil on the site is tested by an independent party and shown to contain levels of hazardous material that would make excavation of an underground parking lot impractical.

Our Appeal:

On behalf of a group of residents and homeowners who live around the immediate perimeter of the property at 113 East 26th St., I respectfully submit this appeal of the Oct. 5th decision of the Minneapolis Planning Commission to grant a variance to increase the maximum FAR at this site. **The focus of our appeal is the applicants' claim that, because of soil contamination, underground parking at the site is not feasible, thereby presenting a "practical difficulty" that prevents them from qualifying for the resulting density bonus**. This position was endorsed on page 7 of the staff report's recommendation to support the request for a variance, which reads: "Due to the contamination in the soil, underground parking is not practical. If it were, the site could qualify for a second density bonus for enclosed parking. It should also be noted that smaller-scale projects have proven economically unfeasible, partly because of the condition of the site's soil."

Based on information provided to us by the MPCA, we maintain that the applicants' do not in fact have adequate knowledge of current soil conditions, and are therefore not in a position to judge whether underground parking is feasible or not. According to a statement by Steven Schoff, the Superfund project manager for this site at the MPCA **(see appendix 1)**, the most recent test of this site's soil was conducted in 2009. However, a vapor extraction system (VSE) that removes toxins from the soil has been running continuously since then, meaning that current levels of soil contamination are significantly lower than they were in 2009. Mr. Schoff also reported that, in order to avoid the risk of becoming liable for contamination at the site, any developer would need to enter the Voluntary Investigation and Cleanup (VIC) Program with the MPCA before construction, a process that would include soil testing to determine the current level of contamination. **As of the writing of this appeal, no application for VIC had been made, and the developer has in fact had no contact at all with the MPCA project manager regarding this site**.

In addition, the limited information that is currently available about the site's soil suggests that underground parking *is* feasible based on existing levels of soil contamination. According to a letter written to the Whittier Alliance by John Evans, supervisor of the Land and Water Unit at Hennepin County (**see appendix 2**), previous excavation, fill removal, and soil testing at the site suggest that **current concentrations of contamination are low enough to meet residential standards and, if**

removed off site, would be suitable for disposal locally as non-hazardous waste (see below for a more detailed discussion of this assessment).

Since an evaluation of the merit of the applicants' request for a FAR variance rests on a full understanding of soil conditions at the site, and since both the MPCA and Hennepin County have supplied information that raises serious questions about the applicants' knowledge of current soil conditions and their presentation thereof, **we are therefore appealing to delay the granting of a FAR variance until the applicants can have soil at the site tested by an independent party, preferably as part of MPCA's Voluntary Investigation and Cleanup Program. Once these tests have been conducted, we ask that a final decision regarding the variance request be made based on their results**. If testing reveals significant hazardous material in the area necessary for excavation (provisionally defined as the surface soil down to a level of 15 feet), such a finding would indeed support the applicants' claims that below-grade construction is impractical. If, on the other hand, testing reveals contamination within levels that are considered non-hazardous at depths necessary for excavation, then the applicants' claim of practical difficulties is without merit, and their request for a variance should be definitively rejected.

What follows in the pages below is 1) a more detailed review of what is known of the site's history and its current soil conditions; 2) an explanation in greater depth of why additional soil testing is necessary in order to approve a variance; 3) some remarks in response to additional reasons given by the Planning Commission for their vote in favor of the applicants' request; 4) additional documentation from outside parties in support of our arguments.

Soil Conditions at 113 26th St. East: Contamination Standards, History of Cleanup, and the Current State of Knowledge

According to information obtained in consultation with both the MPCA and the Hennepin County Land and Water supervisor, when evaluating the soil contamination of any site a fundamental distinction exists between soil that contains "hazardous material," and soil classified as "non-hazardous contaminated fill." While both of these types of soil are technically "contaminated," only the former, "hazardous material," implies the potential for toxins to be released into the environment during removal, and requires special handling and disposal at a dedicated facility outside of Minnesota. By contrast, soil that is non-hazardous is suitable for disposal at a certified local, metro-area landfill. In consequence, its removal is a routine part of development in urban areas, particularly on sites with previous construction, and its presence would not normally render below-grade construction "impractical."

Between 2005 and 2006, Hennepin County conducted extensive soil fill cleanup activities at 113 26th St. which involved both hazardous and non-hazardous contaminated soil (**see Appendix 2**). The site was excavated to depths varying from 4 to 12 feet below grade, and rubble and unsuitable contaminated fill was moved offsite. In all, 380 tons of soil meeting the classification of hazardous waste was removed from the site and disposed of at an out-of-state facility at the cost of $380/ton. In addition, 5,700 tons of non-hazardous contaminated fill was removed and disposed of locally at the cost of $36.81/ton.

According to John Evans, Supervisor of the Land and Water Unit at Hennepin County, this excavated area was subsequently backfilled with "contaminant concentrations that met residential standards and that was geotechnically suitable for reuse at the site." He added: **"While contaminant concentrations may still be detectable in this fill, I would anticipate that the concentrations are low enough to still**

meet residential land use standards…If this fill has to be shipped off-site, I would anticipate that it would be suitable for disposal as non-hazardous waste at a local, metro-area landfill."

Supervisor Evans' evaluation is valid only for the excavated area of the site, down to a maximum depth of 12'. With regard to the native soil beneath this reconditioned fill, he indicated that as of 2005 higher concentrations of contamination were likely to exist there, but that "a soil vapor extraction system has operated at the property since that time, which has removed significant quantities of contaminants from the native soil" (see appendix 2). However, because of the lack of soil testing in recent years, he cautioned that "our data regarding contaminant concentrations in the native soil since the startup of the soil vapor extraction system is limited" (see appendix 3). In other words**, only through further testing will it be possible to say whether soil below the excavation area still contains hazardous material or not**.

Implications of Current Soil Conditions, and the Results of Future Soil Testing, for the Applicants' Claim of "Practical Difficulties"

In general, when evaluating variance requests that depend on a demonstration of "practical difficulties" in complying with zoning, the distinction between "not practical" and "not preferable" is a fundamental one without which the application review process has no meaning.

This distinction between "not practical" and "not preferable" is particularly relevant to the present case, in which the applicants are requesting an increased FAR equivalent to the density bonus that they would normally earn by building an underground parking lot, yet without actually building said lot. The issue here is that, because of the high costs associated with underground parking, it is almost never "preferable" from a developer's perspective to build one: if offered the option of building an above-ground lot and still qualifying for the density bonus, there are few scenarios in which a developer would opt to voluntarily build underground parking. This is, in fact, precisely why the density bonus exists: to incentivize developers to build something that has value from a planning perspective, but that they would otherwise prefer not to pay for.

In this case, it is therefore incumbent on the applicants to show that they do not simply *prefer* to build above-ground as opposed to underground parking, but that *no practical alternative exists* to doing so. The obvious way to demonstrate this with regard to soil contamination would be to show that hazardous materials are still present in places that would necessarily need to be excavated in order to build underground parking. As records from the site's own previous clean-up history indicate, the cost of removal of soil classified as hazardous is a full order of magnitude greater than soil that is contaminated but non-hazardous, making the resulting practical impediments relatively clear cut.

On the other hand**, no such differential exists between the cost of removal and dumping of non-hazardous contaminated soil and standard, uncontaminated soil**. Instead, the removal of non-hazardous-contaminated soil is only ***marginally* more costly**, since it must be brought to local dump certified for contaminated soil. Moreover, with specific reference to this site, **the marginally increased cost of soil removal per ton would be offset by the fact that over 6,000 tons of fill was already removed from the site in 2005 at taxpayer expense**. As a result, a considerable percentage of the surface is already excavated significantly below grade, to a depth of as much as six feet in several places (**see image 1**).

In the final analysis, we are not in a position to say whether previous soil removal would only partially offset the cost of excavation for underground parking, fully offset that cost, or possibly represent such a substantial savings that it would make underground parking at this site *less expensive* than it would be at a normal, uncontaminated site. Fortunately, such considerations of marginal cost difference are not relevant to the decision to grant or to deny a variance. **What *is* relevant is the simple fact that unless the applicants can show the presence of hazardous waste in areas targeted for excavation, their claim that underground parking is "impractical" (or "impossible" in the words of their presentation to the planning commission on October 5th) are unsubstantiated**.

To summarize, **we are asking that the granting of a variance be made conditional on soil testing, since the results of such testing are the only way to substantiate the merit of the applicants' requests for a variance based on the "impracticality" of an underground parking lot.** If soil testing does reveal significant hazardous material at less than 15' below grade, we agree that their request should be approved. Otherwise, the developers are free to choose between a four-story building with an underground parking garage that conforms to zoning, (which they have repeatedly said would be there preference were it not for the site's soil contamination), or a building without a parking garage that, without the density bonus, would be 20% smaller than the current design. Neither of these designs would have any need for a variance.

Additional Considerations:

Before concluding, we would like to offer just a few brief responses points raised by the Planning Commission at their October 5th meeting or recorded in the staff report, that we fell are in need either of correction or of greater nuance. Although some of these fall outside the scope of the specific question of soil quality, they are nevertheless relevant since they provide greater context to our appeal and its motivations.

1) *The current zoning of the building is more recent than suggested at the planning meeting, and has a history directly related to neighborhood priorities for this development site.*
   In explaining the vote in favor of the variance request, at least one member of the planning commission stated that "the zoning of the site is C2 and apparently has been since 1994," suggesting that complaints about the development's size were therefore unfounded. These comments echoed similar arguments presented directly to the neighbors by the developer of the property, who suggested that anyone who had a problem with the design "shouldn't have bought a house next to a lot zoned C2." **But in fact, as indicated in the staff report, 113 26th St. was not rezoned from R2B to C2 until 2005, at a time when most current homeowners on the block were already residents. Moreover, the zoning change was specifically linked to a proposed development at the site involving 14 townhouses, which was actively supported by residents as a way to preserve the low- and medium-density residential character of our street.** This history is important in understanding the high level of frustration among residents regarding the mass and density of the current design, which will have a very different impact the neighborhood, and which would never have been possible without this change of zoning.

2) *Because of this history, the site's anomalous zoning should be an argument against—rather than in favor—of granting the requested variance.*
In her report, the planning officer rated the property's anomalous zoning (as a C2 lot, bordering low-density residential on three sides, on a street that is neither an activity center nor a commercial corridor) as a "special circumstance not created by the applicants" and therefore as a reason *for* granting the applicants' request for a variance. But since the zoning until 2005 was R2b—the same as the single family-houses now adjacent to it—and was rezoned with neighborhood consent in order to *preserve* our street's low-density residential character**, we feel strongly that the height and FAR limits of C2 zoning should now be considered the *outer limits* of what is appropriate for this site – not a justification for even larger, denser, and more massive construction** (as might be appropriate for a site with similar zoning in a commercial corridor or activity center).

3) *Granting the variance <u>will</u> significantly increase the building's perceived mass and impact on its surroundings.*
Several members of the planning commission expressed the view that a vote in favor of a variance was warranted, since the current design's FAR and height limit were no different from a 4-story building that conformed to zoning—implying that the variance would not alter the building's impact on its surroundings. But this view does not take account of the fact that half of the ground floor of the current design is dedicated to an enclosed parking garage, which is not included in the FAR calculation but still contributes to the building's mass. **As a result, the perceived mass of this building will be at least 10% larger than a four-story building with underground parking that conforms to zoning—the equivalent of an additional 6,000 square feet.**

4) *The perception that the site is currently empty because its zoning is too restrictive is unfounded.*
As indicted above, the staff report's recommendation in favor of a FAR variance notes "that smaller-scale projects have proven unfeasible, in part because of the condition of the site's soil." At the Oct. 5th meeting, multiple members of the planning commission expressed similar views, namely that a larger building was justified because of the property's previous difficulties in finding a developer. It should be noted, however, that the first development formally proposed for this site in 2005 was presented prematurely, before the beginning of the excavation and soil conditioning work by Hennepin County described above. No project, regardless of size, could have been completed under those circumstances. And a second project, presented in fall of 2006 as soon as this work was completed, coincided with the beginning of the national mortgage crisis. Thereafter, our community, like many throughout the country, went through an extended period of deep economic distress, with rampant foreclosures, failed businesses, and (in the case of our neighborhood) two catastrophic fires in buildings on the same block as the development site. Under such conditions, it is hardly surprising that there was little interests in developing the property, as development everywhere in Minneapolis—and across the country—was at a historic low. Now, by contrast, our neighborhood is in the midst of a remarkable revival, and the area immediately around 113 E. 26th street has become a magnet for investment. As a result, if soil tests demonstrate that the property is now free of hazardous material, it should be considered prime real estate, with the primary danger to the community

being posed not by the property's difficulty in attracting development interest, but rather the risk to the vitality of the surrounding neighborhood posed by heavy-handed development.

Concluding Remarks:

Over the past several decades, the residents of East Whittier have paid a heavy price for the legacy of industrial pollution at 113 E. 26th St.—a legacy made possible by a combination of corporate irresponsibility and lack of government oversight. Many of us have had our own properties poisoned by the same chemicals dumped at this site. For the last 10 years, all of us have lived with the hazards, the noise, the dirt, and the nuisance of an ongoing industrial cleanup there. We have also paid for this cleanup, to a total of 1.3 million dollars in taxpayer funds. And now that the cleanup has been completed, we have legitimate and widely shared concerns about the development currently proposed for the site, and the long-term impact it will have on our community.

Given this sad history, it is simply not fair that we now be asked to accept a building that neither conforms to zoning, nor fulfills the guarantees for neighborhood stability outlined in the city's comprehensive plan, simply because of "contaminated soil." Before being asked to make yet another sacrifice for the sake of this site, we deserve to know what the effects of its decade-long cleanup effort have actually been. We deserve to know what its current condition actually is. And we deserve a city government that demands the same information before making irreparable decisions about our neighborhood's future.

Appendix One:

From: Steven M. Schoff [mail to: steven.schoff@state.mn.us]
Sent: Tuesday, October 13, 2015 4:37 PM
To: casale@umn.edu
Subject: Re: FW: Whiteway Cleaners

Dear Giancarlo,
Thanks for contacting me. I have received multiple emails from you in regards to the Whiteway Cleaners Site. I have listed all your questions and will attempt to answer them.

Questions:
1. Am I to understand that the extraction of toxins from the soil at this site is 1) ongoing; 2) was completed some time ago; or 3) ended in July of this year?
2. When is the most recent soil testing that has been done on the site(as far as the MPCA knows)
3. Is it the case that the developer would have to enter the VIC program for any residential construction on the site, or only if the project included construction below grade(for example, to build an underground parking lot)?
4. Is it the case that, as of Oct. 5, no one had been in touch with MPCA regarding an application for the VIV program?

Response:
1. The soil vapor extraction system (SVE) is still running. I believe the activity that was observed in July was the developer advancing geo-technical borings looking at the suitability of the soils for construction purpose but since we are not working with any developer at this time, I can't verify this information.
2. Hennepin County did sampling of the soils in 2009, contact John Evans(Henn. Co.) at 612-348-4046, he should be able to tell you the results of the investigation.
3. If a developer wanted assurances to protect them from liability when developing any Site which has contamination they would enter VIC, it doesn't matter if the development is residential or commercial or if the development had underground parking or above ground parking. Developers are not required to enter the VIC program, but if they don't they run the risk of becoming liable for any contamination at the Site.
4. The MPCA has not received an application for VIC for this Site as of today, and I have not talked to any developers about it.

Sincerely,
Steven M. Schoff
Project Manager
Superfund Unit 1
Minnesota Pollution Control Agency
651-757-2701

Appendix Two:

From: John Evans
Sent: Thursday, October 01, 2015 3:13 PM
To: 'marian@whittieralliance.org' <marian@whittieralliance.org>
Subject: Whiteway Cleaners/Despatch Laundry Summary

Marian, you requested additional information relating to soil fill cleanup activities completed by Hennepin County in 2005/2006 at the former Whiteway Cleaners/Despatch Laundry property (now Corson's Corner). In summary, Hennepin County removed building foundations, rubble and unsuitable contaminated fill from the property in order to make the property environmentally and geotechnically suitable for redevelopment. The property was excavated to depths varying from 4 to 12 feet below land surface to accomplish this work. A total of 5700 tons of non-hazardous concrete and contaminated fill subsequently was disposed of at the FCR Buffalo Landfill in Buffalo, Minnesota. The cost per ton for the excavation, hauling and disposal of the non-hazardous contaminated fill was $36.81/ton. Approximately 380 tons of fill meeting the classification of hazardous waste was disposed of at an out-of-state landfill at a cost of $375/ton.

During the cleanup, fill with contaminant concentrations that met residential land use standards and that was geotechnically suitable for reuse at the site was used to backfill the excavation. While contaminant concentrations may still be detectable in this fill, I would anticipate that the concentrations are low enough to still meet residential land use standards. However, if this fill has to be shipped off-site, I would anticipate that it would be suitable for disposal as non-hazardous waste at a local, metro-area landfill. Higher contaminant concentrations may exist in the underlying native soil that was not disturbed during the 2005/2006 cleanup. However, a soil vapor extraction system has operated at the property since that time, which has removed significant quantities of contaminants from the native soil.

John Evans
Supervisor
Land and Water Unit
Hennepin County Environment and Energy
701 Fourth Avenue South, Suite 700
Minneapolis, MN 55415-1842
John.evans@hennepin.us
(612) 348-4046

Appendix Three:

From: John Evans [mailto:John.Evans@hennepin.us]
Sent: Friday, October 02, 2015 3:37 PM
To: marian@whittieralliance.org
Subject: FW: Whiteway Cleaners/Despatch Laundry Summary

Marian, after reviewing more documents relating to the cleanup of the site, the only location where any sub-grade structure was proposed and approved by the Minnesota Pollution Control Agency (MPCA) was a basement that was intended to be constructed in the northeastern corner of the property. The basement was intended to house mechanical equipment and did not extend beneath the entire building. Underground parking was not proposed as part of the previous design. If underground parking is proposed as part of the current development, a response action plan addendum would need to be submitted to the MPCA for review and approval.

I've attached a diagram that depicts the previous depths of fill material at the site prior to the fill cleanup project in 2005/2006. The depth of fill approximates that depth to which fill cleanup occurred. Since the purpose of the cleanup was to excavate and either ship off-site or recondition all fill material, I would anticipate that contaminant concentrations in the existing fill material on-site, which is excavated and reconditioned fill, should meet residential regulatory standards. For example, in the area enclosed by the 12-foot depth of fill contour, I would anticipate that fill extending to 12 feet below the original ground surface (approximately equal to the sidewalk elevation) should meet residential standards and also would be acceptable for disposal as non-hazardous fill at a local landfill. Native soil is present beneath the reconditioned fill and our data regarding contaminant concentrations in the native soil since the startup of the soil vapor extraction system is limited.

Please contact me if you have any questions.

John Evans
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Figure One: Current Depth below Grade (in feet) of Surface at 113 E. 26th Street

(survey and sketch prepared by Mickey Garrity)